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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/773,894	<b>Applicant(s)</b> EDMONDSON ET AL.	
	<b>Examiner</b> FREDA A. NELSON	<b>Art Unit</b> 3628	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 16 May 2008.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,5-15 and 18-24 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,5-15 and 18-24 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

### **DETAILED ACTION**

The amendment received on May 16, 2008 is acknowledged and entered. Claims 1 and 15 have been amended. Claims 2-4 and 16-17 have been canceled. No claims have been added. Claims 1, 5-15 and 18-24 are currently pending.

### ***Response to Arguments***

Applicant's arguments filed May 16, 2008 have been fully considered but they are not persuasive.

In response to applicant's arguments that Eglan et al. certainly does not specify the initial price indicia associator of claim 1, or the step of initially pricing in the manner recited in claim 15, the Examiner respectfully disagrees. Eglan et al. disclose in FIG. 20, the genre page 2000 contains musical artist links 2002 that allow the user to browse the musical works that are available for sale from the listed artists; when one of the musical artist links 2002 is selected, the dynamic pricing system 102 sends to the client 108 a musical artist page 2100, which is shown in FIG. 21; and in the illustrated embodiment, the artist page 2100 contains a name 2102 of the artist and album links 2104 that list the albums available from that artist; and when the customer selects one of the album links 2104, the client 108 displays to the customer an album page 2200 (FIG. 22) that includes album (or CD) name 2202 and song links 2204 for songs on that album (¶ [0081]). Eglan et al. further discloses the price model for dynamically pricing the item, the initial price for the item, and the implicit or marginal cost of the item are stored in fields 336, 338 and 340, respectively, wherein fields 342, 344 and 346

respectively store the minimum price for the item, the maximum price for the item and the current price for the item. The current demand, or the number of times the item was purchased within a specified period, is maintained in field 348. A count cache field 350 stores the number of purchases of the item since the last time the current demand was determined. Pricing algorithm parameters field 352 can store information such as the historical pricing and quantity ordered information for the item. In one form, field 352 stores the price and corresponding demand for the item over the last seven periods. It should be appreciated that depending on the dynamic pricing technique used, field 352 can store other parameters, such as the time between purchases.

### ***Claim Rejections - 35 USC § 112, 1<sup>st</sup> Paragraph***

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

1. Claims 1 and 15 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

While the specification of the instant application discloses that ***“the historical indicia identifies, for instance, a prior sales history of other content created by the content creator; the prior sales history is represented, for instance, in the form of a***

*categorization of prior sales; and a content creator is categorized in one of a selected number of categories based upon prior sales history of the other content created by the content creator",* the Examiner is unable to locate in the specification where the historical indicia identifies historical demand for other content files. The Examiner also asserts that historical demand and historical sales are not equivalent because a demand for an item does not necessarily mean a sale for an item.

### ***Claim Rejections - 35 USC § 112, 2<sup>nd</sup> Paragraph***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 1 and 15 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 1 and 15 recite the limitation "historical demand for other content files" in lines 13 and 10, respectively. There is insufficient antecedent basis for this limitation in the claim.

### ***Claim Rejections - 35 USC § 102***

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

3. Claims 1, 5-14, and 21-23 are rejected under 35 U.S.C. 102(b) as being anticipated by Eglan et al. (US PG Pub. 2003/0023505).

As per claims 1, 7-8, 15, 18, and 21-23 Eglan et al. disclose an apparatus for associating a price indicia with each of the first content tile and at least a second content file stored at a content database of a content distribution facility, each of the first and at least second content files authored by content creators, said apparatus comprising:

a content creator database forming an author index that indexes a listing of content creators together with historical indicia associated with respective content creators (paragraphs [0063],[0065])

an initial price indicia associator adapted to receive content indicia associated with each of the first and at least second content files stored at the content database and adapted to access said content creator database, said initial price indicia associator for initially pricing each of the first and at least second content files with initial price indicia, the initial price indicia formed responsive to the historical indicia indexed at said content creator database and identifying historical demand for other content files authored by the content creators indexed together therewith (paragraphs, [0059]-[0060],[0063],[0081],[0122]-[0123],[0136]; see FIG. 3) {the music databases 230 can store the file name of a song, the location of the file on the home music server 220, song title, artist, author, producer, distributor (label), album name, album picture, picture of the artist, musical category (i.e. rock, jazz . . . ), description, comments, *pricing information, demand information*, and/or length/size of the song along with other information relating to the song};

a price indicia adjuster adapted to receive indications of the initial price indicia that said initial price indicia associator associates with each of the first and at least second content files and to receive indications of demand for each of the first and at least second content files, said price indicia adjuster for adjusting the initial price indicia responsive to the demand therefore and for forming adjusted price indicia associated with each of the first and at least second content files (abstract; paragraphs[0058], [0099]) *{the system dynamically adjusts pricing of the media content and delivers the media content to the clients that order the media content at a dynamically adjusted price; all requests for the song are initially placed with the "home" music server 220, which is the second music server 220b in this example, and if the second, home music server 220b is unable to process a request for the song, the second music server 220b redirects the request to one of the other music servers 220 that has a copy of the song, which in this case is the first music server 220a; during initialization of the dynamic pricing system 102, a song is loaded from the master file server 214 onto the second music server 220b, which becomes the "home" music server 220 for this particular song and as the song becomes popular, the second music server 220b can place a copy of the file containing the song onto the first music server 220a so as to optimize performance of the dynamic pricing system 102; and all requests for the song are initially placed with the "home" music server 220, which is the second music server 220b in this example, and if the second, home music server 220b is unable to process a request for the song, the second music server 220b redirects the request to one of the*

*other music servers 220 that has a copy of the song, which in this case is the first music server 220a}.*

Egla et al. does not disclose said historical indicia including indicia of historical demand for content files authored by the respective content creators indexed together therewith; and the initial price indicia formed responsive to said historical demand for content files authored by the respective content creators of each of said first and at least second content files indexed together therewith; wherein the initial price indicia formed is further responsive to the delivery mechanism by which content is delivered to a respective content consumer; and wherein the initial price indicia formed is further responsive to whether a respective content consumer is a commercial content consumer or a non-commercial content consumer, however claims directed to an apparatus must be distinguished from the prior art in terms of structure rather than function, *In re Danly* 263 F.2d 844, 847, 120 USPQ 582, 531 (CCPA 1959). A claim containing a "recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus" if the prior art apparatus teaches all the structural limitations of the claim. *Ex parte Masham*, 2 USPQ2d 1657 (bd Pat. App. & Inter. 1987). Thus the structural limitations of claim 1 including a content creator database (*paragraphs [0063],[0065]*), an initial price associator (*paragraphs, [0059]-[0060],[0136]*) , a price adjuster (*abstract; paragraphs[0058], [0099]*) are disclosed in Egla et al. described herein. Also as described the limitations of the claim do not distinguish the claimed apparatus from the prior art.



As per claims 5-6, Eglan et al. disclose the apparatus of claim 1 wherein the historical indicia responsive to which said initial price indicia associator initially prices the first and at least second content files identifies historical demand for content files authored by the content creators indexed together therewith (paragraphs [0064],[0123]) {pricing algorithm parameters field 352 can store information such as the historical pricing and quantity ordered information for the item; and alternatively or additionally, the dynamic pricing system 102 in this and other embodiments can automatically set the initial price based on default prices and/or historical prices for similar content stored in memory 112}.

As per claims 9-13 and 20, Eglan et al. disclose the apparatus of claim 8 wherein the inquiries relating to the purchase of the copies of the individual ones of the first and at least second content files comprise indications of purchase requests made by the content consumers (paragraph [0122]){the dynamic price modifier increases the price of an item when demand for that item increases and reduces the price of an item when the demand for the item decreases and in one form, the dynamic pricing modifier is based on the differences between the quantity ordered at specific intervals wherein, for instance, these intervals can be by second, by minute, hourly, daily, monthly, or yearly; and in another form, the dynamic pricing modifier is based on the time between successive purchases; for example, if the time delay between successive purchases decreases, the dynamic pricing system 102 can infer that demand is increasing and thus increase the price for the item}.

As per claim 14, Eglan et al. disclose the apparatus of claim 1 further comprising a revenue allocator adapted to receive the indications of demand, said revenue allocator for allocating revenues associated with the first and at least second content files (paragraph 0158; FIG. 30E and FIG. 31) {the owner of the dynamic pricing system 102 generates revenue by receiving a portion of the revenue generated by the sale of items on the dynamic pricing system 102}.

As per claim 19, Eglan et al. disclose the apparatus of claim 15, wherein the content indicia associated with each of the first and at least second content files comprise identifiers that identify the content creators of the first and at least second content files, respectively (paragraph [0060]) {the music databases 230 can store the file name of a song, the location of the file on the home music server 220, song title, artist, author, producer, distributor (label), album name, album picture, picture of the artist, musical category (i.e. rock, jazz . . . ), description, comments, pricing information, demand information, and/or length/size of the song along with other information relating to the song}.

As per claim 21, Eglan et al. discloses wherein the initial price indicia formed is adjusted based on the delivery mechanism by which content is delivered to a respective content consumer ([0050],[0162]).

As per claims 22 and 24, Eglan et al. discloses wherein the initial price indicia formed is adjusted based on whether a respective content consumer is a commercial content consumer or a non-commercial content consumer.

***Examiner's Note***

Examiner cited particular pages, columns, paragraphs and/or line numbers in the references as applied to the claims above for the convenience of the applicant.

Although the specified citations are representative of the teachings in the art and are applied to the specific limitations within the individual claim, other passages and figures may apply as well. It is respectfully requested that, in preparing responses, the applicant fully consider the references in entirety as potentially teaching all or part of the claimed invention, as well as the context of the passage as taught by the prior art or disclosed by the examiner.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Freda A. Nelson whose telephone number is (571) 272-7076. The examiner can normally be reached on Monday - Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, John Hayes can be reached on 571-272-6708. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only.

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For more information about the PAIR system, see <http://pair-direct.uspto.gov>.

Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/F. A. N./  
Examiner, Art Unit 3628

/JOHN W HAYES/  
Supervisory Patent Examiner, Art Unit 3628